Filed 6/25/19 P. v. Richardson CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW TED RICHARDSON, Defendant and Appellant.	H045367 (Monterey County Super. Ct. No. SS170708A)

Appellant Matthew Ted Richardson entered into a written plea agreement in which he pleaded no contest to a felony and admitted he had suffered a prior strike conviction. Richardson did not waive his right under *People v. Arbuckle* (1978) 22 Cal.3d 749 (*Arbuckle*) to be sentenced by the judge who had taken his plea and agreed that he would not seek to withdraw his no contest plea after it was entered. Subsequent to Richardson's plea agreement, the judge who had taken his plea realized he had prosecuted Richardson for the crime that formed the basis of the strike allegation. Prior to sentencing, that judge recused himself from Richardson's case.

Richardson sought to withdraw his plea, arguing that the unavailability of the original judge for sentencing constituted an *Arbuckle* violation. The judge to whom the case had been reassigned denied Richardson's motion to withdraw his plea, finding that Richardson had waived his right to move to withdraw his no contest plea and that

Arbuckle did not apply where a judge recused himself prior to sentencing. The judge to whom the case had been reassigned proceeded to sentence Richardson.

For the reasons explained below, we conclude that the trial court erred in its conclusions that no *Arbuckle* violation had occurred and that Richardson had waived his right to seek to withdraw his plea in the event of an *Arbuckle* violation. Accordingly, we reverse the judgment and remand with directions that the trial court grant Richardson's motion to withdraw his plea.

I. FACTS AND PROCEDURAL BACKGROUND

Richardson was charged by complaint in May 2017[1] with inflicting corporal injury upon a specified person (Pen. Code, § 273.5, subd. (a); count 1). The complaint also alleged that Richardson had suffered a prior felony strike conviction in 2006 (Pen. Code, §§ 667, subd. (d), 1170.12). At the first court date following his arraignment, Richardson entered a plea of no contest before Judge Burlison.[2]

Richardson's defense counsel described the terms of the agreement: "[t]he district attorney has offered if [Richardson] would plead guilty or no contest to the offense as charged and with the prior strike, that the maximum term . . . would be four years because of the strike. And he also agreed that the minimum term would be two years. The Court would have the option of imposing the minimum term if the Court granted a *Romero* motion." The prosecutor confirmed to the trial court "that's correct."

The parties entered into a written plea agreement. Richardson placed his initials in the space next to item 15 under the "specified waivers" section. Item 15 reads "(Limited Waiver for Non-Stipulated Sentence) I hereby waive and give up all rights to appeal, writ, litigate, challenge or contest in the future any order issued by this court made *before*

[1] Unless otherwise indicated, all dates referenced in this section occurred in 2017.

[2] We include the names of the individual judges who presided over hearings in Richardson's case because their identities are relevant to understanding Richardson's claims on appeal.

the date indicated next to my signature below. I give up the same rights concerning all contents of this waiver of rights form and conditions of my entry of plea and conviction as stated herein. I further agree not to ask the court to withdraw my plea for any reason after it is entered."

Richardson did not initial the space next to item 17 of the plea form, which reads "(*Arbuckle* Waiver) I give up my right to be sentenced by the judge who accepts this plea." The space next to item 17 contains a handwritten entry that reads "N/A."

Judge Burlison reviewed the terms of the written plea agreement with Richardson, and Richardson replied that he understood them. Referencing item 15 of the written plea agreement Judge Burlison stated, "[y]ou have initialed in number 15, paragraph number 15, indicating that you are giving up all appellate rights as part of this plea agreement. [¶] Is that correct?" Richardson said, "Yes, Your Honor."

Richardson pleaded no contest to the charge of corporal injury on a spouse or cohabitant and admitted the prior strike conviction. No one at the hearing referenced any involvement Judge Burlison may have had in the prosecution of Richardson's prior strike conviction.

On August 31, the parties appeared for the *Romero*[3] motion and sentencing. At that court appearance, Judge Burlison stated, "The Court just for the record did disclose a potential appearance of conflict if the Court had to rule on the *Romero* motion, and explained it to both sides. And I'll go ahead and go in further detail on that on [September] 12th. [¶] Right now the Court is just going to continue the matter until the 12th . . . ." Judge Burlison did not disclose any more information on the record about the conflict; nor did he recuse himself from Richardson's case.

On September 12, the parties again appeared before Judge Burlison. Defense counsel requested a continuance until September 19, which the trial court granted.

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[3] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

Judge Burlison did not disclose any more information on the record about his potential conflict; nor did he recuse himself from Richardson's case.

At the September 19 hearing, Judge Burlison stated, "at the time of the filing of the *Romero* motion, the Court realized that it had handled the case involving Mr. Richardson at the earlier stage in terms of the *Romero* motion. [¶] The Court does not have any conflict at all with regard to this matter from a personal standpoint and feels it can be fair and impartial as to both sides in hearing the motion. And so I just want to make that known for the record."

Judge Burlison further stated, "However, really, the Court's handling of the previous matter would give an appearance of conflict; and really, it's the appearance of conflict which causes the Court to have to declare a 170.1 disqualification on this Court. [¶] And specifically, I just want the record to reflect that the Court was unaware of this conflict, and as soon as it did discover this potential conflict, it did disclose it to both attorneys. And so the matter is on today for the Court's declaring of that conflict on the record. [¶] Specifically, the minute order should reflect the Court does have a conflict. And the specific code section would be California Code of Civil Procedure [section] 170.1[, subdivision] [(a)](6)(A)(i), and then specifically [(a)](6)(A)(iii). [¶] So really, that's the section that really gives the Court pause and requires this Court to declare a conflict at this point." Richardson told the trial court that he would move to withdraw his plea.

The trial court transferred Richardson's case to Judge Culver. Richardson filed a motion to withdraw his plea and put forth three independent arguments. He contended that newly discovered evidence that was not discovered until after the plea was entered materially affected "the case and plea decision"; he did not waive *Arbuckle* and Judge Burlison's recusal should not "negate Mr. Richardson's right to withdraw his plea"; and

his plea was invalid because Judge Burlison's conflict of interest existed before Richardson entered his plea.[4]

After several continuances, Judge Culver heard Richardson's motion on October 26. At the October 26 hearing, Judge Culver outlined her understanding of the facts. "[T]he case was before Judge Burlison. A plea was entered. . . . [P]art of the plea agreement was that there would be a *Romero* heard after the plea was entered and before sentencing. And when that *Romero* was in process, it was learned that Judge Burlison was a prosecutor in the DA's office at the time that the strike offense occurred and actually was the prosecutor in that case. [¶] Once he learned that, he determined that it would be appropriate—he did not have any personal recollection of the prosecution. But he determined that it would be appropriate to disqualify himself to avoid the appearance of impropriety or the appearance of unfairness."

Judge Culver further stated, "I also went through the judge's notes that are not a public document, but they're available to the Court so that I can see if there were any particular notes by Judge Burlison about in particular the *Romero* or notes in particular about whether or not he was to be the sentencing judge. [¶] There are occasions where, as part of the plea agreement, parties put on the record that there is a particular judge that they want a matter to be heard by. And as a result, you know, that is something to be considered. [¶] I did not find that in any of the judge's notes in this matter nor was I provided with a transcript that indicated that was part of the plea agreement."

Judge Culver denied Richardson's motion to withdraw his plea. Based on item 15 on the plea form, Judge Culver found "that waiver was knowing and intelligent and does

[4] With respect to the newly discovered evidence, Richardson argued that on the day he entered his no contest plea the victim's medical records were not available, and he entered his plea based on a mistaken assumption about the severity of the victim's injuries. Richardson also stated that he did not know at the time he entered his change of plea that the victim was not requesting that Richardson be sentenced to prison, as reflected in her later statement in the probation report.

impact this attempt to withdraw the plea. And for that reason, I deny the attempt to withdraw the plea." The trial court also found that the medical records were not newly discovered evidence because the evidence could have been discovered by either party.

Turning to the *Arbuckle* issue, Judge Culver stated, "the right to have the judge who took the plea actually sentence is not an absolute right. And that is something that I think all of the cases talk about. Death, sickness, retirement, a number of things may result in another judge taking over a case. [¶] And in fact, in this particular case, while Judge Burlison was excluded from handling the case because of the disqualification of himself, the defense still had any 170.6 rights and could have exercised them. There is nothing in the record that—in addition, there is nothing in the record, as I mentioned previously, that indicated that this is a case in which the deal rested upon Judge Burlison being the sentencing judge. There's no transcript, no minute order, no notes to that effect. [¶] So I don't find that the lack of an *Arbuckle* waiver is one that causes me to set aside this plea."

Judge Culver also rejected Richardson's contention that the plea agreement itself was invalid due to Judge Burlison's disqualification because under Code of Civil Procedure section 170.3, subdivision (b)(4), in the absence of good cause, rulings made up until the time of disqualification shall not be set aside. Judge Culver concluded, "So I don't find that the fact that Judge Burlison was the prosecutor on the prior strike conviction—and he didn't know it at the time. I don't find that that should cause him to—or should cause the plea to be withdraw[n] or backed out at this point."

On November 2, Judge Culver denied Richardson's *Romero* motion and sentenced him to four years in prison.

Richardson sought a certificate of probable cause from the trial court, which denied the request. Richardson sought a petition for a writ of mandate in this court, which this court denied. Richardson filed a petition for review in the California Supreme Court, which that court granted and transferred the case back to this court with directions

to issue an alternative writ. This court issued an alternate writ to the trial court. The trial court subsequently filed a certificate of probable cause, allowing Richardson to appeal the judgment.

II. DISCUSSION

Richardson makes three challenges on appeal to the trial court's order denying his motion to withdraw his plea. Relying on the California Supreme Court's decision in *K.R. v. Superior Court* (2017) 3 Cal.5th 295 (*K.R.*), Richardson argues that the trial court erred in its interpretation of *Arbuckle* and in its conclusion that Richardson in the written plea agreement had waived any right to withdraw his plea in the event the judge who took his plea was not available for sentencing. Richardson also contends that his conviction must be reversed because his plea was taken by a judge who was subject to disqualification at the time of Richardson's plea. Finally, Richardson maintains that his conviction must be reversed because he did know at the time of his plea that the victim had not suffered great bodily injury, and he would not have agreed to the plea bargain had he known the true nature of the victim's injuries.

For the reasons set forth below, we conclude the trial court erred in its determination that Richardson had waived his right to withdraw his plea in the event of an *Arbuckle* violation, and the trial court violated Richardson's *Arbuckle* rights by denying his motion to withdraw his plea. In light of this conclusion, we reverse the judgment and do not reach Richardson's remaining arguments.

A. *Standards of Review*

We review a trial court's denial of a motion to withdraw a plea for abuse of discretion. (*People v. Patterson* (2017) 2 Cal.5th 885, 894.) " '[W]hen a trial court's decision rests on an error of law, that decision is an abuse of discretion.' " (*Ibid.*) "The *Arbuckle* right is not a constitutional or a statutory right; it is contract right recognized in the case law." (*In re Cristian S.* (2017) 9 Cal.App.5th 510, 521.) " ' "[A] negotiated plea agreement is a form of contract and is interpreted according to general contract

principles." ' " (*People v. Bueno* (2019) 32 Cal.App.5th 342, 346 (*Bueno*).) When interpreting a plea agreement, "we apply the ordinary standards of review applicable in cases involving the interpretation of contracts generally. [Citation.] '[T]he "interpretation of a contract is subject to de novo review where the interpretation does not turn on the credibility of extrinsic evidence." ' " (*People v. Paredes* (2008) 160 Cal.App.4th 496, 507.)

Here, the parties do not identify any ambiguity in the terms of the plea agreement; therefore, we need not examine extrinsic evidence. (See *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 [describing the use of extrinsic evidence to interpret a contract given a threshold showing of ambiguity].) As we examine only questions of contract interpretation and the application of legal principles to undisputed facts, our review of the plea agreement and the application of *Arbuckle* are de novo. Based on that analysis, we then determine whether the trial court abused its discretion when it denied Richardson's motion to withdraw his plea.

B. *Waiver Provision of the Plea Agreement and* Arbuckle

In *Arbuckle*, *supra*, 22 Cal.3d 749, the California Supreme Court recognized as an implied term in all plea agreements that "whenever a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge." (*Id.* at pp. 756-757.) Unless a defendant has validly waived this implied term, if the original judge is not available the defendant "must be given the option of proceeding before the different judge available or of withdrawing his plea." (*Id.* at p. 757, fn. 5; see also *Bueno*, *supra*, 32 Cal.App.5th at p. 351.)

The Attorney General argues that Richardson waived his right to withdraw his plea in the event of an *Arbuckle* violation because in the plea agreement he expressly agreed not to withdraw his plea for any reason after it was entered. Richardson counters that his waiver of his right to withdraw his plea was unknowing and therefore invalid

because he did not know when he entered into the plea agreement that Judge Burlison would recuse himself as the sentencing judge.[5] As explained further below, we need not determine whether Richardson's waiver of his right to file a motion to withdraw his plea was knowingly entered, because applying ordinary rules of contract interpretation we conclude that Richardson did not waive his right to withdraw his plea in the event of an *Arbuckle* violation.

Two provisions of Richardson's written plea agreement bear on this question. Richardson initialed item 15 which reads, "I hereby waive and give up all rights to appeal, writ, litigate, challenge or contest in the future any order issued by this court made *before* the date indicated next to my signature below. I give up the same rights concerning all contents of this waiver of rights form and conditions of my entry of plea and conviction as stated herein. *I further agree not to ask the court to withdraw my plea for any reason after it is entered*." (Italics added.) Richardson did not initial item 17, which reads "(*Arbuckle* Waiver) I give up my right to be sentenced by the judge who accepts this plea." The space next to item 17 contains a handwritten entry that reads "N/A."

By declining to initial box 17, it is clear that Richardson did not waive his right to be sentenced by Judge Burlison, the judge before whom he entered his plea.[6]

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[5] In his opening brief Richardson also suggests that the last sentence of item 15 was not a waiver because it does not contain the word "waiver." However, Richardson acknowledges that in the provision he agreed to ask not to withdraw his plea after it was entered, and in his reply brief Richardson does not renew this argument. A "waiver" is the "express relinquishment of a right or privilege." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.) Penal Code section 1018 provides defendants the right to seek to withdraw their pleas. (See Pen. Code, § 1018; *People v. McGee* (1991) 232 Cal.App.3d 620, 623 ["Section 1018 permits the defendant, *and only the defendant*, to enter a guilty plea or make a motion to withdraw a previously entered plea."].) Therefore, item 15 constitutes a waiver.

[6] We do not understand the "N/A" written next to item 17 to indicate that Richardson waived his *Arbuckle* right, and the Attorney General similarly does not contend that Richardson entered an *Arbuckle* waiver as part of the plea agreement.

The Attorney General does not contend otherwise. Instead, the Attorney General argues that because Richardson generally waived his right to withdraw his plea in item 15, he was not entitled to that remedy in the event of an *Arbuckle* violation. In light of this waiver, Richardson received the only other remedy available to him in the event of an *Arbuckle* violation—that is, sentencing before a different judge.

The relevant question we must decide is whether Richardson's general waiver of his right to withdraw his plea for any reason subsumed his right to withdraw his plea in the event of an *Arbuckle* violation. Because this question involves the interpretation of a plea agreement, we turn to general principles of contract interpretation. (See *Doe v. Harris* (2013) 57 Cal.4th 64, 69.)

" 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.)' " (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) Richardson's election not to initial box 17 makes clear that the parties intended the *Arbuckle* rule to apply.

"Courts must interpret the contractual language to give force and effect to every provision and avoid an interpretation that 'renders some clauses nugatory, inoperative or meaningless.' " (*People v. Doolin* (2009) 45 Cal.4th 390, 413, fn. 17.) "[W]here two clauses of a contract are apparently in direct conflict, it is the duty of the court to reconcile the conflicting clauses so as to give effect to the whole of the instrument, if that is possible within the framework of the general intent or predominant purpose of the instrument." (*In re Marriage of Williams* (1972) 29 Cal.App.3d 368, 379.) "A contract term should not be construed to render some of its provisions meaningless or irrelevant." (*Estate of Petersen* (1994) 28 Cal.App.4th 1742, 1754, fn. 4.)

The Attorney General's reading of Richardson's plea agreement violates these principles. Under the Attorney General's interpretation of the plea agreement, the only remedy for the violation of Richardson's implied right to be sentenced by the judge who took his plea is the very act leading to the violation—namely sentencing by a different

judge to whom Richardson did not consent. The Attorney General's interpretation of the plea agreement therefore renders meaningless its promise that Richardson would be sentenced by the same judge before whom he entered his plea. As we must interpret the plea agreement to give effect to every provision in the contract, we read Richardson's general waiver of his right to seek to withdraw his plea as subject to a specific exception—namely, the occurrence of an *Arbuckle* violation.

This interpretation accords with another longstanding principle of contract interpretation. "[U]nder well established principles of contract interpretation, when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision." (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1235; see also *Continental Casualty Co. v. Zurich Ins. Co.* (1961) 57 Cal.2d 27, 35.) The *Arbuckle* term of the plea agreement implicitly includes the *Arbuckle* rule itself and the remedy for its violation, which that case describes as the defendant's right to choose between sentencing by the new judge *or* the right to withdraw from the plea agreement. (*Arbuckle, supra,* 22 Cal.3d at p. 757, fn. 5.) We conclude that the implicit promise contained in item 17 that Richardson would be able to withdraw his plea if Judge Burlison were not available for sentencing controls over the general waiver in item 15 of his right to move to withdraw his plea. For these reasons, Richardson did not waive his right to withdraw his plea in the event of an *Arbuckle* violation.

We turn now to the question whether the trial court's denial of Richardson's motion to withdraw his plea where the judge before whom he entered his plea was recused from his case constituted a violation of *Arbuckle*.

C. Arbuckle *Violation*

Judge Culver concluded that her sentencing of Richardson, notwithstanding that Judge Burlison had taken Richardson's plea of no contest, did not violate Richardson's *Arbuckle* rights for two reasons. First, she found nothing in the trial court record that indicated "the deal rested upon Judge Burlison being the sentencing judge. There's no

transcript, no minute order, no notes to that effect." Second, she stated "the right to have the judge who took the plea actually sentence is not an absolute right. And that is something that I think all of the cases talk about. Death, sickness, retirement, a number of things may result in another judge taking over a case. [¶] And in fact, in this particular case, while Judge Burlison was excluded from handling the case because of the disqualification of himself, the defense still had any 170.6 rights and could have exercised them."

The California Supreme Court has rejected the contention that a defendant's *Arbuckle* right turns on whether the record reflects a specific desire to be sentenced by the judge before whom the plea agreement was entered. "[N]either *Arbuckle* nor its progeny support the notion that a defendant's ability to enforce the same-judge guarantee, a term implied in every plea agreement, is dependent on a defendant (or juvenile) first making a factual showing that he or she subjectively intended the judge taking the plea would also pronounce sentence." (*K.R.*, *supra*, 3 Cal.5th at p. 298.) "[T]he language in *Arbuckle* is plain: It sets forth a 'general principle' that '*whenever* a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge.' (*Arbuckle*, *supra*, [22 Cal.3d] at pp. 756–757, italics added.) The clear import of *Arbuckle*'s holding is thus contrary to the notion that the implied term of the plea is somehow dependent on a defendant's pointing to evidence in the record of his or her expectation regarding the identity of the sentencing judge." (*Id*. at p. 309.) Therefore, the trial court erred in requiring Richardson to show anything other than he had elected not to waive his *Arbuckle* rights in the plea agreement.

We turn now to the second reason cited by the trial court in its finding that no *Arbuckle* violation had occurred—namely that the *Arbuckle* right is "not absolute" and does not apply where the judge is not available due to recusal. We note that the Attorney General does not defend this aspect of the trial court's ruling, instead contending that,

although Richardson had the right to have Judge Burlison sentence him, the only remedy available to Richardson in light of his plea agreement waiver was to be sentenced by another judge. Nevertheless, as our review is de novo and some courts have read *Arbuckle* as limited to situations in which the unavailability of the original judge is due solely to court administrative concerns, we examine this question.

In the case of *People v. Dunn* (1986) 176 Cal.App.3d 572 (*Dunn*), the Third District Court of Appeal held that "*Arbuckle* does not apply in a case where the judge's unavailability is due not to internal administrative problems or convenience of the court but to retirement of the judge, a matter clearly beyond the power of the court to control." (*Id*. at p. 575.) The court in *Dunn* reasoned that "[w]hile it is established that the implied term of a negotiated plea first recognized by *Arbuckle* will override competing administrative practices of the court, it is clear to us that a negotiated plea does not carry with it an implied promise that the judge accepting the plea will not resign, retire, expire or be removed from the bench pending imposition of sentence. The People appropriately bear the risk of a judge's unavailability due to matters within the control of the court, but no good reason appears why they should bear the risk that the judge before whom [the] defendant plead is no longer vested with judicial power to pass sentence. To the implied term recognized by *Arbuckle* that the judge accepting the plea will impose sentence must be added an implied condition: if that judge then still actively exercises judicial power." (*Ibid*.) Other courts have followed the principle articulated in *Dunn* and found *Arbuckle* inapplicable in the case of a judge's illness (*People v. Jackson* (1987) 193 Cal.App.3d 393, 403) or a judge's death (*People v. Watson* (1982) 129 Cal.App.3d 5, 7).

This court, however, has previously rejected the reasoning of *Dunn*, examining a situation where the judge who had taken the defendant's plea was not available for resentencing because the prosecution filed a motion of disqualification pursuant to Code of Civil Procedure section 170.6 upon remand for resentencing. (*People v. Letteer* (2002) 103 Cal.App.4th 1308 (*Letteer*) overruled on other grounds by *Peracchi v. Superior*

Court (2003) 30 Cal.4th 1245 (*Peracchi*).)[7] In *Letteer*, this court "question[ed] the validity of the *Dunn* exception" (*Letteer*, at p. 1315) and found its exception to *Arbuckle* "unwarranted." (*Id*. at p. 1316.)

This court observed in *Letteer* that "*Dunn* only states the obvious and does not further explain why unavailability due to resignation, retirement, etc. should negate an implied term of the bargain and prevent the defendant from withdrawing the plea, even though sentencing by a different judge is a significant deviation from the plea bargain. Moreover, even if at the time of the plea a defendant knows, or should know, that the same judge will not impose sentence if he or she retires, resigns, dies, etc., *Dunn* does not explain why a defendant could not still reasonably expect the chance to withdraw the plea if that happened." (*Letteer*, *supra*, 103 Cal.App.4th at p. 1317.) In *Letteer* this court rejected *Dunn*'s "risk assessment" (*ibid*.) approach and instead stated "the issue is simply whether sentencing by a different judge constitutes a significant deviation from the terms of the plea bargain. If it is, then the defendant should not be held to the bargain and must be allowed to withdraw the plea." (*Id*. at pp. 1317–1318.)

The California Supreme Court has not endorsed the restrictive reading of the *Arbuckle* rule announced in the *Dunn* line of cases. In *K.R.*, the California Supreme Court rejected an analogous narrowing of the *Arbuckle* rule and described its *Arbuckle* holding as resting on the recognition that " '[b]ecause of the range of dispositions available to a sentencing judge, the propensity in sentencing demonstrated by a particular judge is an inherently significant factor in the defendant's decision to enter a guilty plea.' " (*K.R.*, *supra*, 3 Cal.5th at p. 305.) This observation focuses on the perspective of

[7] In *Peracchi*, the California Supreme Court overruled the assumption made in *Letteer* that a peremptory challenge under Code of Civil Procedure section 170.6 made for the first time at a resentencing hearing was timely filed. (*Peracchi*, *supra*, 30 Cal.4th at p. 1258, fn. 6.)

the defendant considering whether to enter into a plea bargain—not on court administrative considerations or on the views of the prosecution.

In *K.R.* the California Supreme Court described the *Arbuckle* disposition in the following terms: "[b]ecause the defendant in that case was denied that aspect of his plea bargain, *Arbuckle* reversed and remanded, explaining that he should be sentenced by the same judge who accepted his plea, 'or if internal court administrative practices render that impossible, then in the alternative defendant should be permitted to withdraw his plea.' " (*K.R.*, *supra*, 3 Cal.5th at p. 305.) However, neither in *Arbuckle* nor in *K.R.* did the California Supreme Court limit the *Arbuckle* rule to judicial unavailability because of court administrative concerns. Instead, *K.R.* reiterated "we adhere to the plain and original understanding of *Arbuckle* that in every plea in both adult and juvenile court, an implied term is that the judge who accepts the plea will be the judge who pronounces sentence. Should the People wish to allow a different judge to preside at sentencing (or, in juvenile cases, disposition), they should seek to obtain a waiver from the pleading defendant or juvenile." (*Id.* at p. 312.) Nothing in *K.R.* or *Arbuckle* suggests the kind of risk assessment reasoning employed by the court in *Dunn*.

Following this court's prior reasoning in *Letteer* and reinforced by the California Supreme Court's recent decision in *K.R.*, we conclude that, absent a valid waiver of *Arbuckle* rights, an *Arbuckle* violation occurs where the judge who has taken the defendant's plea is unavailable for sentencing because he has recused himself from the defendant's case. In Richardson's case the judge who had taken Richardson's plea was unavailable because of judicial recusal. Pursuant to *Arbuckle*, therefore, Richardson should have been given "the option of proceeding before the different judge available or of withdrawing his plea." (*Arbuckle*, *supra*, 22 Cal.3d at p. 757, fn. 5.)

Richardson did not agree to be sentenced by Judge Culver and instead sought the alternative remedy articulated in *Arbuckle*—that is withdrawal of his plea. We have already concluded that Richardson in his written plea agreement did not waive this

remedy in the case of an *Arbuckle* violation. The trial court committed a legal error when it found *Arbuckle* did not apply to Richardson, and therefore its order denying Richardson's motion to withdraw his plea constituted an abuse of discretion.

For these reasons, we reverse the judgment and order that Richardson's motion to withdraw his plea be granted.

III. DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to allow Richardson to withdraw his plea of no contest and to enter a new plea.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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BAMATTRE-MANOUKIAN, J.

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